

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Master-In-Equity

SC Court of Appeals

Hon. Deadra L. Jefferson, Circuit Court Judge
Hon. Mikell R. Scarborough, Master-In-Equity

Case No. 2016-CP-10-2955

Appellate Case No. 2021-000272

TCC of Charleston, Inc., Appellant/Respondent,

v.

Concord and Cumberland, LLC, Concord & Cumberland HPR, Leo Hall, Diane Hall, Bea H. Smith, Margaret C. Pope, William D. Foster, Jr., Gene G. Foster, Mattison J. MacGillivray, Teresa MacGillivray, Pamela L. Vaughn, Nelia A. Patricio, Trustee of the Nelia A. Patricio Revocable Trust Agreement, Stuart D. Reeves, Edward T. Strom, Barbara K. Henderson, James R. Clarke, Paul A. Brim, Robert K. Seidl, Jennifer M. Seidl, Robert Kenneth Seidl, II, M. Bert Storey, Thomas R. Mather, Edward T. Strom, 304 Concord & Cumberland, LLC, Marion M. Simpson f/k/a Marion Moore McDonald Simpson, Kathy Gardner, Gregory J. Gardner, Freeman Waterfront Properties, LLC, Jo-Ann Cooper, Betty Y. Segal, Robert M. Levin, and Bonita K. Levin, Donald D. Leonard, Betty L. Beatty, Mattellen, LLC, and Thomas R. Debnam, Trustee of the Trust Agreement of Thomas R. Debnam, Defendants,

Of Which Concord & Cumberland HPR is the Respondent/Appellant.

RESPONDENT/APPELLANT'S MOTION TO STRIKE

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Respondent/Appellant hereby moves to strike from the Appellant/Respondent's initial briefs and the record various documents and references to material not in the record. Rule 210(c) of the South Carolina Appellate Court Rules provides that "the Record shall not, however, include matter that was not presented to the lower court or tribunal." Specifically, the Respondent/Appellant seeks to strike the following documents– and all references to them in the Appellant/Respondent's briefs – because they were never presented to the circuit court.

Appellant's Designation of Matters to Be Included in the Record on Appeal, dated May 10, 2021

- Item No. 14: HPR Proposed Order re Arbitration Award¹, dated March 22, 2019;
- Item No. 16: Concord & Cumberland HPR's Motion for Reconsideration, dated May 17, 2019;
- Item No. 47: TCC Arb. Exh. 33 –May 27, 2015 Letter Agreement
- Item No. 48: TCC Arb. Exh. 73 – PCO 130
- Item No. 49: TCC Arb. Exh. 130 – PCO 142

Appellant's Designation of Matters to Be Included in the Record on Appeal, dated June 9, 2021

- Item No. 1: Trial Brief of TCC of Charleston, Inc. ², dated January 17, 2019; and
- Item No. 2: TCC of Charleston Proposed Order to Panel;

In addition, the Appellant/Respondent makes references to these documents in its initial briefs as follows:

Initial Brief of Appellant, dated May 10, 2021

- Page 3: "When the HPR encountered funding issues in May and June of 2015, TCC

¹Only Page 1 and Page 19 are part of the circuit court's record and are already included as a proposed designated matter in Item No. 29. of Appellant's Designation of Mater to Be Included in the Record on Appeal, dated May 10, 2021.

² Only Page 27 of TCC's Trial Brief is part of the circuit court's record and is already included as a proposed designated matter in Item 22 of Appellant's Designation of Mater to Be Included in the Record on Appeal, dated May 10, 2021.

advised the HPR that it could not proceed without adequate assurances of funding. To avoid a shutdown of the project, the parties reached an agreement that included approval of payment requests and assurances by the HPR that TCC would be compensated for its additional work. The agreement was reduced to writing on May 27, 2015. **ROA ____.**”

- Page 4: “The HPR made partial payments on certain of TCC’s proposed change orders; TCC expressly did not waive its entitlement to the remainder of its costs. *E.g.*, **ROA ____** (PCO 130, Jan. 26, 2015, TCC Arb. Exh. 73).”
- Page 9: “(iii) Proposed Change Order # 142 relating to the work on the stone tower. (**ROA ____**).”
- Page 20: “despite subsequent agreements between the parties . . . (i) to perform additional, unforeseen work on a “cost plus” basis and (ii) to leave certain issues to be resolved after the end of the project, and (iii) the HPR’s architect’s recognition that cost-plus items were to be resolved at the conclusion of the project.”
- Page 20: “in spite of (i) the agreement to hold certain items to the end of the job, (ii) TCC’s pay applications specifically reserving claims to such amounts, and (iii) numerous other writings preserving the cost-plus agreement.”
- Page 25: “That both parties understood this is evidenced by the fact that, in their proposed orders, both the HPR and TCC sought an award of attorneys’ fees from the Panel.”
- Page 25, fn. 18: **ROA ____** (HPR Proposed Order) (“Further, the Panel agrees to entertain a motion by C&C for payment by TCC of its attorneys’ fees”); **ROA ____** (TCC’s Motion for Prejudgment Interest, Costs of Arbitration, and Attorneys’ Fees and Costs).
- Page 26: “*three* separate motions before the arbitrators to correct or reconsider the arbitration award (**ROA ____, ____, ____**)”

Response Brief of Appellant/Respondent TCC of Charleston, Inc., dated June 9, 2021

- Page 7: “TCC asked for this precise relief in their pretrial brief (ROA ____), the issue was tried, the relief was asked for requested by TCC in its post-trial proposed order to the panel (**ROA ____**) and the relief was granted by the Panel.”

There is no material in the record that supports these documents and statements, and therefore they must be stricken from the record. Respondent/Appellant respectfully requests that these materials and statements be stricken from the record.

WOMBLE BOND DICKINSON (US) LLP

A handwritten signature in blue ink, appearing to read "Cordes Ford", is enclosed in a light blue rectangular box.

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August 13, 2021

Charleston, SC